

STATE OF OREGON

IBLA 71-163

Decided May 22, 1972

Appeal from a decision (Oregon 2536) rejecting an application for a material source site under the Federal Highway Act.

Vacated and remanded.

Rights-of-Way: Federal Highway Act

Where an unrestricted appropriation of a material site under the Federal Highway Act is inconsistent with land management programs, the application therefor may be rejected or a material site may issue under terms and conditions necessary to maintain program values.

Materials Act -- Rights-of-way: Federal Highway Act

The Materials Act does not permit a free-use permit to be issued for mineral materials where disposal is otherwise specifically authorized by law. A free-use permit may not be issued in lieu of a material site duly applied for under the Federal Highway Act.

APPEARANCES: State of Oregon: Oregon State Highway Department.

OPINION BY MR. FRISHBERG

The Oregon State Highway Department filed an application for a material source site under provisions of the Federal Highway Act, 23 U.S.C. § 317 (1970) and 43 CFR Subpart 2821. By decision of December 20, 1970, the application was rejected

\* \* \* because it is not in the public interest to transfer jurisdiction of this land to the Oregon State Highway Department. Management authority must be retained in the Bureau of Land Management in order to best assure protection of the environment and reclamation of land necessarily damaged as a result of surface mining.

The decision further stated that "this office is willing to approve a Free Use Permit for a period of ten years." When the State requested reconsideration the case was transmitted to this office as an appeal.

Inherent in the offer to issue a free-use permit was the finding that the land applied for is suitable for a material site for state highway use. Were a free-use permit to issue it would be pursuant and subject to the terms and provisions of the Materials Act, 30 U.S.C. sec. 601 (1970). That Act, in pertinent part, provides:

The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials \* \* \* on public lands of the United States \* \* \* if the disposal of such mineral or vegetative materials (1) is not otherwise expressly authorized by law. \* \* \*

But the material site is expressly authorized by the Federal Highway Act. It follows, when the Secretary of Transportation informed this Department of Oregon's requirement for a certain material site, that it was incumbent for the Bureau of Land Management to consider the State's application under the law and regulations under which it was filed. Among those regulations is 43 CFR 2821.3-2, which states, in part, as follows:

When the lands involved are under the jurisdiction of the Department of the Interior an applicant will be expected, at the earliest possible date prior to the filing of an application, to consult with the local officials of the Bureau or Office having jurisdiction over the land to ascertain whether or not the use or appropriation of the lands for right-of-way purposes is consistent with the management program and to agree to such measures as may be necessary to maintain program values. Failure to do so may lead to an unresolvable conflict of interest and necessitate disallowance of the application.

The cited regulation contains a two-pronged admonition. The Bureau must ascertain those measures necessary to maintain program values. The State must understand that reasonable measures to protect program values may be imposed. Both the applicant and the Bureau must bear this in mind; we suggest that they resolve their differences at the local level in order to arrive at measures mutually agreeable, failing in which the application may be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is vacated and the case is remanded to the Bureau for appropriate action.

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Newton Frishberg, Chairman

We concur:

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Martin Ritvo, Member

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Frederick Fishman, Member

